Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BETTY ROUSH,

Petitioner,

v.

KFC NATIONAL MANAGEMENT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Court of Appeals violate the Seventh Amendment, or otherwise err, when it:

(a) overturned the amount of the jury verdict for the proven violation of the Age Discrimination in Employment Act,

(b) made its own determination of the amount that should have been awarded by the jury, and

(c) directed the district court to enter judgment in that amount?

(2) Did the court of appeals err in reversing the district court's denial of judgment n.o.v. and overturning the jury's finding that respondent had violated state law?

PARTIES

All of the parties who participated below are set out in the caption.

KFC National Management Company is a subsidiary of PepsiCo, Inc..

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2
- A. The Proceedings Below 2
- B. Statement of Facts 3

REASONS FOR GRANTING THE WRIT 6
- I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT FORBIDDING APPELLATE REVIEW OF THE MAGNITUDE OF JURY VERDICTS 6
- II. THE DECISION OF THE SIXTH CIRCUIT DIRECTING THE DISTRICT COURT TO MODIFY THE JURY VERDICT AND ENTER A JUDGMENT SMALLER THAN THE JURY'S OWN VERDICT CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS, AND OF THIS COURT, WHICH HOLD THAT THE SEVENTH AMENDMENT PERMITS A COURT ONLY TO AUTHORIZE A REMITTITUR OR ORDER A NEW TRIAL 16

III. THE DECISION BELOW, OVERTURNING THE JURY'S FINDING OF LIABILITY ON PETITIONER'S TORT CLAIM, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH RULE 51, F.R.C.P. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: *Pages:*

Anderson v. Bessemer City,
470 U.S. 564 (1985) 16

Blackwell v. Sun Elec. Corp.,
696 F.2d 1176 (6th Cir. 1983) 18

Bogan v. Stroud,
958 F.2d 180 (7th Cir. 1992) 24

Browning-Ferris v. Kelco Disposal,
492 U.S. 257 (1989) 8

Chicago, R.I. & P.R. Co. v. Kifer,
216 F.2d 753 (10th Cir. 1954) 10

City of Lincoln v. Power,
151 U.S. 546 (1893) 8, 9

Coca Cola Bottling Co. of Black Hills v. Hubbard,
203 F.2d 859 (8th Cir. 1953) 24

Crabb v. KFC Nat'l. Management Co.,
952 F.2d 403 (6th Cir. 1992) 2

Defender Industries, Inc. v. Northwestern Mutual
Life Inc. Co.,
938 F.2d 502 (4th Cir. 1991) 19, 21

Eastman Kodak Co. v. Southern Photo Materials Co.,
273 U.S. 359 (1927) 9

Fairmont Glass Workers v. Cub Fork Coal Co.,
287 U.S. 474 (1933) 9

Pages:

Grunenthal v Long Island Railroad Co.,
393 U.S. 156 (1968) 7, 8, 12

Guzman v. Western State Bank of Devils Lake,
540 F.2d 948 (8th Cir. 1976) 18

Hazen Paper Company v. Walter F. Biggins,
123 L. Ed. 2d 338 (1993) 3

Herenica v. Guzman,
219 U.S. 44 (1910) 10

Howell v. Marmpegaso Compania Naviera,
536 F.2d 1032 (5th Cir. 1976) 15

Humana of Kentucky, Inc. v. Seitz,
796 S.W.2d 1 (Ky. 1990) 23

Kennon v. Gilmer,
131 U.S. 22 (1889) 16, 21, 22

Keyes v. Lauga,
635 F.2d 330 (5th Cir. 1981) 15

Lippo v. Mobil Oil Corp.,
776 F.2d 706 (7th Cir. 1985) 15

McKinnon v. City of Berwyn,
750 F.2d 1383 (7th Cir. 1984) 20

Miller v. Maryland Casulty Co.,
40 L. Ed. 2d 463 (2d Cir. 1930) 11

Morgan v. Woessner,
997 F.2d 1244 (9th Cir. 1993) 20, 21

Natco, Inc. v. Williams Brothers Engineering,
489 F.2d 639 (5th Cir. 1974) 16

Pages:

Neese v. Southern Railway Co.,
350 U.S. 77 (1955) 6, 7, 8, 12

New York Central and H.R.R. Co. v. Fraloff,
100 U.S. 24 (1879) 8

New York, L.E. & W.R. Co. v. Winter,
143 U.S. 60 (1892) 10

New York, N.H. & R.R. Co. v. Zermani,
200 F.2d 240 (1st Cir. 1952) 10

O'Gilvie v. International Playtex, Inc.,
821 F.2d 1438 (10th Cir. 1987) 20

Peoples Bank and Trust v. Globe Intern. Pub.,
978 F.2d 1069 (8th Cir. 1992) 15

Phelan v. Local 305, United Ass'n of
Journeymen, etc.,
973 F.2d 1050 (2d Cir. 1992) 19

Phoenix R. Co. v. Landis,
231 U.S. 578 (1913) 10

Powers v. Wilson,
110 F.2d 960 (2d Cir. 1940) 11

Pullman Standard v. Swint,
456 U.S. 273 (1982) 14

Rowlett v. Anheuser-Busch, Inc.,
832 F.2d 194 (1st Cir. 1987) 18

Sanders v. Leach,
158 F.2d 486 (5th Cir. 1956) 11

Pages:

Scala v. Moore McCormack Lines,
985 F.2d 680 (2d Cir. 1993) 19

Schrand v. Federal Pacific Electric Co.,
851 F.2d 152 (6th Cir. 1988) 3

Shamblin's Ready Mix, Inc. v. Eaton Corp.,
873 F.2d 736 (4th Cir. 1989) 19

Solomon Dehydrating Co. v. Guyton,
294 F.2d 439 (8th Cir. 1961) 11

Southern R. Co.-Carolina Division v. Bennett,
233 U.S. 80 (1914) 10

Springfield v. Kibbe,
480 U.S. 257 (1987) 24

St. Louis, I.M. & S.R. Co. v. Craft,
237 U.S. 648 (1915) 9

St. Louis South Western R. Co. v. Ferguson,
182 F.2d 949 (8th Cir. 1950) 11

St. Louis v. Praprotnik,
485 U.S. 112 (1988) 24, 25

Stevenson v. Hearst Consol. Publications,
214 F.2d 902 (2d Cir. 1954) 10

Texas & Pacific R.R. Co. v Hill,
237 U.S. 208 (1915) 9

Vassbinder v. Scott,
976 F.2d 118 (2d Cir. 1992) 19, 20

Wabash R. Co. v. McDaniels,
107 U.S. 454 (1883) 10

Pages:

Waters-Pierce Oil Co. v. Deselms,
212 U.S. 159 (1909) 10

Whitnack v. Douglas County,
16 F.3d 954 (8th Cir. 1994) 24

Will v. Comprehensive Accounting Corp.,
776 F.2d 665 (7th Cir. 1985) 24

Wilson v. Everett,
139 U.S. 616 (1891) 10

Statutes: *Pages:*

28 U.S.C. § 1254 (1) 1

29 U.S.C. § 621 *et seq* 2, 3, 6, 16

Betty Roush respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 2, 1993.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Kentucky, which is not officially reported, is set out at pp.19a-28a of the Appendix. The opinion of the Sixth Circuit regarding the merits of this case is reported at 10 F.3d 392 (6th Cir. 1993), and is set out at pp. 1a-16a of the Appendix.[1] The order of the Sixth Circuit denying rehearing, which is not officially reported, is set out at pp.17a-18a of the Appendix.

JURISDICTION

The decision of the Sixth Circuit was entered on December 2, 1993. A timely petition for rehearing was denied on January 27, 1994. Jurisdiction of this Court is invoked under 28 U.S.C § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the U.S. Constitution provides:

> In suits at common law, where the value in controversy exceeded twenty dollars, the right of trial by jury shall be preserved,

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[1] The decision of the Sixth Circuit in a separate appeal regarding counsel fees is reported at 10 F.3d 390 (6th Cir. 1993). The court of appeals remanded the counsel fee issue to the district court for reconsideration in light of the Sixth Circuit's separate opinion on the merits of petitioner's claim. That counsel fee issue, which is still pending in the district court, would necessarily be affected by a decision by this Court on the merits of the case.

> and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. The Proceedings Below

This action was filed by petitioner, Betty Roush, in Kentucky state court on September 19, 1986. Petitioner alleged that respondent, her former employer, had committed the tort of intentional infliction of emotional distress and had dismissed petitioner because of her age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq.. On October 8, 1987, respondent filed a petition to remove the case to the United States District Court for the Western District of Kentucky. All subsequent proceedings were held in federal court[2].

Petitioner's claim was tried to a jury in March 1991. The jury found for petitioner on both her ADEA claim and her pendant state tort claim. The jury awarded petitioner $100,000 in damages on her ADEA claim, and $50,000 on her tort claim. Respondent filed a post-trial motion seeking judgment n.o.v. on both claims. Respondent's motion also asserted that the amount of the $100,000 ADEA verdict was excessive, and asked the district court to order a new trial or a remittitur. The district court denied the motion. (Pet.

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[2] At respondent's request, petitioner's claim was tried together with that of Wetonah Crabb, who was fired by respondent on the same date as petitioner. Ms. Crabb alleged she had been dismissed in retaliation for assisting petitioner in combatting age discrimination. The jury rejected Crabb's claim, and its decision was upheld on appeal. *Crabb v. KFC Nat'l. Management Co.*, 952 F.2d 403 (6th Cir. 1992). Crabb's claim is not before this Court.

App. 19a-28a).[3]

On appeal the Sixth Circuit concluded that the district court had properly denied judgment n.o.v. regarding petitioner's ADEA claim. (Pet. App. 4a-6a). The court of appeals concluded, however, that the amount of the jury award on the ADEA claim was "clearly excessive." (Pet. App. 6a-14a). The court of appeals ruled that petitioner's ADEA award should be "reduced to $24,386". (Pet. App. 14a). The Sixth Circuit did not order that a new trial on the issue of damages be held unless petitioner would agree to a remittitur reducing the award to $24,386. Rather, the court of appeals simply directed "entry of judgment in this amount" by the district court on remand. (Pet. App. 14a). The appeals court also granted judgment n.o.v. on petitioner's state tort claim. (Pet. App.14a-16a).

A timely petition for rehearing, and a suggestion for rehearing en banc, were denied.

B. Statement of Facts

Petitioner, an employee in respondent's payroll department, was dismissed in September 1985. At the time

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[3] The jury had also found that respondent's violation of the ADEA was willful, a determination that would require that the ADEA award be doubled. The district court concluded that its jury instruction on the issue of willfulness was inconsistent with the then controlling Sixth Circuit decision regarding willfulness and therefore vacated the jury verdict regarding willfulness. *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. (1988). (Pet. App. 26a-27a). No further proceeding has yet occurred regarding the vacated finding of willfulness. The Sixth Circuit decision in *Schrand* was expressly overturned by this Court's decision in *Hazen Paper Company v. Walter F. Biggins*, 123 L.Ed.2d 338, 350 (1993).

of her dismissal petitioner was 61. Following her dismissal two younger women were hired to do her work. Petitioner's supervisor insisted petitioner was fired for alleged performance deficiencies. The jury, however, concluded that petitioner was actually dismissed because of her age. (Pet. App. 3a).

The evidence in support of the jury's verdict reveals far more than a simple case of age based dismissal. Petitioner was repeatedly called an "old bag" and an "old gummer" by her supervisors and others. (Pet. App. 6a)[4]. She was ridiculed and mimicked by that supervisor and her colleagues because of her hearing, her false teeth, and the way she walked[5]. At the instance of her supervisor, petitioner's fellow employees ostracized her[6], denied her

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[4]Crabb tr. 39 ("she was called names, she was ridiculed on a daily basis. They called her old bag, they called her old gummer"), 44 ("Ron started calling her old bag. It kind of stuck. ... Old bag became as simple as saying Betty"); Roush tr. 45 (testimony of petitioner; "I got the word old gummer ... because at one time I had to go the dentist to have my plat[e] fixed ... [my] [l]ower plate.... It was only out about 48 hours. There was no reason for making fun of my teeth.")

[5]Crabb tr. 43 ("Robin would make fun of the way Betty walked. She had this cute little imitation she did of somebody with a cane and hearing aid going hey, and running around the office.... [W]e all laughed.... I guess we were all guilty."), 42 ("Judy found her ear plugs. She took the ear plugs out and Betty with her hearing problems, they were pretty nasty, I guess, and Judy went all through the office with these ear plugs howling and laughing about that. She thought that was great ... look at this poor old lady's ear plugs.").

[6]Crabb tr. 39 ("They didn't eat with her. We would go out after work and go to Chi Chi's, have a drink. Betty was not invited. If she came into the lunch room, we moved, all of us."); Roush tr. 55 (testimony of petitioner; "I would get my tray and sit down at the table and they would get up and leave. That hurts.... I think what have I done wrong.... They would get up and leave as soon as I got

assistance given other workers,[7] and disrupted her work[8]. Petitioner was denied a key training assignment because she was "too old." (Pet. App. 6a). Her supervisor maliciously assigned her to extra tasks that would be painful because of her arthritis.[9] Petitioner's work breaks were scheduled so that she could not socialize with fellow workers,[10] and the one employee willing to eat lunch with petitioner was instructed by her supervisor not to do so.[11] Petitioner's physician testified that the stress caused by this extended abuse led him to prescribe tranquilizers for petitioner, and to urge her to stay away from her office for several months.[12]

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there.")

[7]Tr. v. iii, p.153:

"A. Well, when you got finished, you were supposed to help everybody else who wasn't finished.

"Q. Were you given any instructions that differed from that with regard to Betty Roush?

"A. ... [Y]es, they told us not to help her."

[8]Crabb tr. 41 ("when Betty wasn't there, they went through her desk a lot ... and ... took out all her little paper clips and her rubber bands and her envelopes...."); Roush tr. 46 (testimony of petitioner; "they had turned my desk upside down, took out every bit.... They said I needed the exercise.")

[9]Roush tr. 46 - 51; Ex.46.

[10]Crabb tr. 39 ("She was put on a separate lunch hour from the rest of us to keep her from eating with us."); Roush tr. 54 (testimony of petitioner; "The rest of the office would go to lunch. When they came back, I could take my lunch.")

[11]Crabb tr. 40 ("Debbie suggested I disassociate myself with Betty completely.... She told me to quit eating lunch with Betty.")

[12]Tr. v. iii, pp. 103-07.

Petitioner presented extensive evidence regarding the monetary loss caused by her dismissal, including testimony by a certified public accountant and a twelve page financial analysis prepared by that accountant detailing her losses.[13] The District Court concluded that the amount of the ADEA verdict "was based upon substantial evidence which was unrebutted by KFC." (Pet. App. 24a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT FORBIDDING APPELLATE REVIEW OF THE MAGNITUDE OF JURY VERDICTS.

The threshold question raised by the decision below -- whether and when a court of appeals can review the decision of a district judge upholding the amount of a jury verdict -- is one which this Court has twice granted certiorari to determine, but which remains unresolved.

In *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955), the Court granted review to decide whether a circuit court had the authority to overturn as excessive a jury verdict that had been upheld by the trial judge. The questions presented in *Neese* were:

1. Whether ... excessiveness or inadequacy of a jury verdict is subject to review by federal appellate courts?
2. Whether an Order of the District Court overruling a motion for a new trial ... is

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[13]Roush tr. 84-89; tr. v. iv, pp. 292-303; Ex. 90.

> subject to review by a federal appellate court[14].

This Court in *Neese* reinstated the district court's order approving the jury verdict, and the verdict itself, without reaching the underlying Seventh Amendment question.

Similarly, in *Grunenthal v Long Island Railroad Co.*, 393 U.S. 156 (1968), the Court granted certiorari to decide:

> Whether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness?[15]

Again, however, this Court concluded, without reaching that recurring question, that the particular jury verdict at issue, and the district court order sustaining it, should not have been overturned on appeal.

This Court noted in 1989 that this pivotal question regarding the respective roles of district courts and courts of appeals remained unresolved:

> We have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue in both instances we found it unnecessary to reach the question when we

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[14]Petition for a Writ of Certiorari, *Neese v. Southern Railway Co.*, No. 28, October Term 1955, p. 2. The second question referred to a motion for a new trial on the ground that the amount of the jury verdict was excessive.

[15]Petition for a Writ of Certiorari, *Grunenthal v Long Island Railway Co.*, No. 35, October Term 1968, p.2.

> decided the case. See *Neese v. Southern R. Co.*, 350 U.S. 77 (1955) (even assuming appellate review power under the Seventh Amendment, Court of Appeals was not justified in reversing denial of new trial on the particular facts of the case); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968).(same)

Browning-Ferris v. Kelco Disposal, 492 U.S. 257, 279 n.25 (1989). This case presents the same issue which certiorari was granted to resolve in *Neese* and *Grunenthal*; certiorari should be granted here to finally decide that question.

A grant of certiorari is warranted here, as in *Neese* and *Grunenthal*, because the action of the court of appeals below conflicts with numerous decisions of this Court. On repeated occasions in the past this Court has held that only a trial judge can set aside a jury verdict as excessive or inadequate. In 1879 Justice Harlan explained:

> [T]his court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, ... the remedy ... rested with the court below.... But that court ... refused to disturb the verdict.... Whether its action, in that particular was erroneous or not, our power is restricted by the Constitution to the determintion of ... questions of law....

New York Central and H.R.R. Co. v. Fraloff, 100 U.S. 24, 31-32 (1879). Expressly relying on the Seventh Amendment, *City of Lincoln v. Power*, 151 U.S. 546 (1893), refused to entertain a challenge to the size of a jury verdict:

> The plaintiff in error complains that the

> damages found by the jury were excessive ... But it is not permitted for this court, sitting as a court of errors, in a case where in damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of jury. ... An error of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial.

151 U.S. at 438. The Court emphasized that at common law such a motion could be granted "only ... by the court where the issue was tried." Id.

In *Fairmont Glass Workers v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), Justice Brandeis explained:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for an error of fact ... has been frequently applied when the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.... Sometimes the rule has been rested on ... the Seventh Amendment....

287 U.S. at 481-82. This Court has reiterated that rule in at least ten other decisons.[16]

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[16] *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) ("the question as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive"); *Texas & Pacific R.R. Co. v Hill*, 237 U.S. 208, 215 (1915) ("the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open"); *St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 661 (1915) (district court

Well into the twentieth century, the courts of appeals complied with the decisions of this Court that appellate courts could not review the decision of a trial judge denying or granting a motion to set aside a jury verdict as excessive or inadequate.[17] In 1930 Judge Learned Hand, invoking

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decision rejecting objection to amount of jury verdict "is not open to reconsideration here"); *Southern R. Co.-Carolina Division v. Bennett*, 233 U.S. 80, 87 (1914) ("a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error"); *Phoenix R. Co. v. Landis*, 231 U.S. 578, 581 (1913) ("an objection that ... the damages allowed were excessive, cannot be considered in this court"); *Herenica v. Guzman*, 219 U.S. 44, 46 (1910) ("the objection that ... the damages allowed were excessive, cannot be considered"); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909) (although state appellate courts not subject to the Seventh Amendment may be able to entertain claims that a jury verdict was excessive, "it is clear that this Court does not possess such a power."); *New York, L.E. & W.R. Co. v. Winter*, 143 U.S. 60, 75 (1892) ("[w]hether the verdict was excessive, is not our province to determine. The correction of that error, if there were any, lay with the court below upon a motion for a new trial"); *Wilson v. Everett*, 139 U.S. 616, 621 (1891) ("The principal ground of complaint by the defendant seems to be that the jury had no basis for finding a verdict for $10,000.... But this was a question to be reached only through a motion for a new trial; and we cannot ... review any error committed in that respect by the jury, if there were one"); *Wabash R. Co. v. McDaniels*, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment, upon the ground that the damages are excessive, cannot be doubted").

[17] *Chicago, R.I. & P.R. Co. v. Kifer*, 216 F.2d 753, 756-57 (10th Cir. 1954) (court of appeals "may not review the action of a District Court" granting or denying a new trial on the ground of alleged excessiveness of the verdict "because that is an error of fact," *citing Fairmont Glass Works*); *Stevenson v. Hearst Consol. Publications*, 214 F.2d 902, 911-12 (2d Cir. 1954) (applying "our long established practice, in accordance with ... the Fairmont Glass case ... not to enter upon a consideration of whether the trial judge should have so appraised the facts as requiring an exercise of his discretionary power to grant a new trial"); *New York, N.H. & R.R. Co. v. Zermani*, 200

that long line of decision, insisted "we cannot review an order denying a new trial." *Miller v. Maryland Casulty Co.*, 40 L.Ed.2d 463, 464 (2d Cir. 1930). While still on the Eighth Circuit, then Judge Blackmun observed:

> [This court has] ... stated that the excessiveness of a verdict "is not for our consideration" but is a matter directed "solely to the judgment and conscience of the trial judge on a motion for a new trial." ... In reaching this result we have referred at times to the Seventh Amendment and to the common law as it existed in 1791 upon the Amendment's adoption ... [I]n our opinion inadequacy or excessiveness of a verdict is basically, and should be a matter for the trial court....

Solomon Dehydrating Co. v. Guyton, 294 F. 2d 439, 446 (8th Cir. 1961).

F.2d 240, 245-46 (1st Cir. 1952) ("The defendant cannot relitigate the issue of damages on this appeal, as it seeks to do"; *citing Fairmont Glass Works*, *Southern Ry.-Carolina Division*, *City of Lincoln* and *Herencia*); *St. Louis South Western R. Co. v. Ferguson*, 182 F.2d 949, 955 (8th Cir. 1950) ("the Fairmont Glass Works Case,the Southern Railway Case, the City of Lincoln Case, and the New York L.E. & W.R. Case ... categorically declare that it is not within the province of a federal appellate court ... to consider whether a verdict is excessive...."); *Sanders v. Leach*, 158 F.2d 486, 487 (5th Cir. 1956) ("The rule ... that in an action at law the question of the amount of damages is a question of fact to be settled in the trial court and cannot be reexamined in the appellate court for excessiveness or insufficiency... has always been and still is in jury cases, because of the 7th Amendment, an absolute rule."); *Powers v. Wilson*, 110 F.2d 960, 961 (2d Cir. 1940) ("where the jury has actually attempted to assess damages... we will not review the order of the trial judge denying a new trial, though we may think the award quite excessive or inadequate; that is, we have refused to consider whether his action was an abuse of discretion," *citing Fairmont Glass Works*).

When the Fourth and then the Second Circuits departed from the longstanding decisions of this Court, certiorari was granted in *Neese* and then *Grunenthal* to address that conflict. Appellate decisions overturning the amount of jury verdicts were initially infrequent; the respondent in *Neese* conceded that only two other cicuits had ever done so.[18] When, however, *Neese* and *Grunenthal* failed to address this problem, the practice became far more frequent. Today appellate review and disapproval of the amount of jury verdicts is commonplace in the courts of appeals, and this Court's repeated prohibitions against such appellate activism are either ignored or forgotten.

The decision in the instant case illustrates how far the Sixth Circuit has strayed from this Court's admonition that the district courts are exclusively responsible for determining whether the amount of a jury verdict is excessive or inadequate.

(1) The Court of Appeals believed that the question of excessiveness turned first on whether the jury instructions given by the District Court forbade the jury from including front pay in its award of damages. (Pet. App. 8a-10a). The District Court believed that the instructions did permit the jury to include front pay, explaining "Front pay . . . could . . . properly be considered by the jury in reaching its verdicts." (Pet. App. 25a)[19]. The District Court was particularly well situated to recognize the meaning of its jury instructions, and to realize how the jury would have understood them. The Sixth Circuit acknowledged that the

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[18] Brief of Respondent Opposing Petitioner for a Writ of Certiorari, No. 28, October Term 1955, p. 8.

[19] See also Pet. App. 25a ("We find . . . that an award of front pay can properly be made in this case from the evidence presented by Roush.")

wording of the jury instructions was ambiguous.[20]

This was, in short, a situation in which deference should have been paid to the District Court's interpretation of its own instructions if the views of the District Court were entitled to any weight whatsoever. Instead, the Sixth Circuit made its own *de novo* interpretation of the jury charge:

> We . . . agree with KFC that the district court's instructions to the jury did not authorize the jury to make an award of front pay

(Pet. App. 10a)(emphasis added), and sternly rebuked the district court for having held that the verdict could include front pay.(Pet. App.12a).

(2) As the Court of Appeals implicitly acknowledged, respondent had never argued in the District Court that the instructions forbade the jury to include front pay in its damage award. (Pet. App. 6a-7a). On the contrary, in its post-trial motion respondent objected to the inclusion of front pay on an entirely different ground, arguing that petitioner had not sought reinstatement,(Pet. App. 24a-25a), an argument which the Sixth Circuit rejected on appeal. (Pet. App. 8a-9a). The Sixth Circuit suggested that this lack of objection was not fatal because respondent had "preserved for appeal" an objection to the inclusion of front pay in the damage award (Pet. App. 7a), even though the specific objection on which the Court of Appeals relied in overturning the jury verdict had never been presented to the District Court.

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[20] The Court of Appeals described the damages instruction as "cursory" and observed only that "as given, the instruction does not appear to authorize an award of front pay." (Pet. App. 11a n. 11)(Emphasis added).

If the excessiveness of a jury verdict were a question of law, the lack of such a specific objection would not necessarily be fatal. But the opinions of this Court hold that the decision whether to set aside a jury verdict as excessive is a matter within the discretion of the trial court. It is impossible to understand how a district judge could be said to have abused his discretion because he failed to sustain an argument that was never made to him.

(3) Once the Court of Appeals concluded that the jury was not authorized to include front pay in its award of damages, the remaining question was whether the jury's verdict was excessive as an award of back pay alone. That, however, was an issue which the district judge had never had occasion to consider, since he had concluded--erroneously in the eyes of the Sixth Circuit--that the damage award could include front pay as well.

Under these circumstances the decisions of this Court emphatically required, at the least, that the issue be remanded to the district judge to decide, in the first instance, whether the verdict was excessive as an award for back pay, and, if so, by how much. That determination raised purely factual issues, and

> fact finding is the basic responsibility of district courts, rather than appellate courts . . . [T]he Court of Appeals should not resolv[e] in the first instance [a] factual dispute which had not been considered by the District Court.

Pullman Standard v. Swint, 456 U.S. 273, 291-92 (1982). That admonition applies with special force where, as here, the factfinding responsibility is part of an exercise of informed discretion by the District Court. Even if that exercise of discretion would have been reviewable on appeal, which we deny, no such review was possible until the

asserted excessiveness of the verdict as a back pay award had first been considered by the District Court.

Rather than follow the course dictated by this Court's opinions, the Sixth Circuit proceeded to make its own determination *nisi prius* as to whether the jury verdict was excessive as an award of back pay. It concluded:

> We agree [that] . . . no rational appraisal of the evidence supports a back pay award of $100,000 . . . . $24,386 . . . is the maximum a jury could reaonably find to be compensatory for [petitioner's] loss.

(Pet. App. 8a, 14a)(Emphasis added). What conclusion the District Court might have reached on these fact-specific issues the Sixth Circuit neither knew nor cared.[21]

Other circuits have wisely eschewed such efforts to determine on appeal the maximum amount that a jury might have awarded. Decisions in these circuits have chosen to determine only whether the original verdict was excessive, remanding to the district court for calculation of the appropriate remittitur. *Peoples Bank and Trust v. Globe Intern. Pub.*, 978 F.2d 1069, 1071 (8th Cir. 1992)(district court to order "a substantial remittitur"); *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 717 (7th Cir. 1985) (district court to determine "an appropriate remittitur"); *Keyes v. Lauga*, 635 F.2d 330, 336 (5th Cir. 1981) ("[w]e leave it to the district court ... to determine the amount of the remittitur"); *Howell*

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[21] The determination of the appropriate back pay involved complex calculations involving lost earning, possible lost raises, lost retirement benefits, lost social security benefits, and penalties for early withdrawals, all less certain interim income. Rather than refer this analysis to the trial judge, the Sixth Circuit selected $24,386 as the maximum permissible award because that was the figure "[a]ccording to KFC's brief." (Pet. App. 8a n.7).

v. Marmpegaso Compania Naviera, 536 F.2d 1032, 1035 (5th Cir. 1976) ("we think the trial court ... better able to ... suggest a proper remittitur than we"); *Natco, Inc. v. Williams Brothers Engineering*, 489 F.2d 639, 641 (5th Cir. 1974) (district court to determine what remittitur would equal "the outer limit of the proof.")

In sum, far from accepting as binding the determination of the District Court that the verdict was not excessive, or even deferring to the exercise of discretion by the trial court, the Sixth Circuit usurped completely the role of the district judge, overturning the District Court's decision, and the jury verdict, on grounds which the trial judge was never even accorded an opportunity to consider. At best the Sixth Circuit has turned proceedings in the trial court into a mere "try out on the road," prior to "the main event" in the court of appeals. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

II. THE DECISION OF THE SIXTH CIRCUIT DIRECTING THE DISTRICT COURT TO MODIFY THE JURY VERDICT AND ENTER A JUDGMENT SMALLER THAN THE JURY'S OWN VERDICT CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS, AND OF THIS COURT, WHICH HOLD THAT THE SEVENTH AMENDMENT PERMITS A COURT ONLY TO AUTHORIZE A REMITTITUR OR ORDER A NEW TRIAL.

Having concluded that the original jury verdict on petitioner's ADEA claim was excessive, the Sixth Circuit, rather than ordering a new trial or authorizing a remittitur, simply ordered entry of a reduced judgment. In *Kennon v. Gilmer*, 131 U.S. 22 (1889), this Court unanimously held that such an order violated the Seventh Amendment. The type

of order issued by the Sixth Circuit below is prohibited as unconstitutional in five other circuits.

For almost two centuries following the adoption of the Seventh Amendment, in those instances in which a court had held a jury verdict excessive, the only action that was or could be taken by a federal court was to order a new trial on the issue of damages. That order might provide for a remittitur, allowing the plaintiff to avoid a retrial if he or she accepted a smaller judgment, but the plaintiff until recently always had the option of rejecting the remittitur and opting for a new trial.

The Sixth Circuit decision in this case presents a recent and patently unconstitutional innovation. Instead of requiring a new trial, perhaps subject to the option of remittitur, the Sixth Circuit ordered a direct and unconditional modification of the jury's own verdict:

> Roush['s] ... damage award for back pay should be reduced to $24,386 ... We remand for entry of judgment in this amount.

(Pet. App.14a)[22]

The circuit courts are understandably divided as to whether any federal court can directly modify in this manner a jury verdict which it regards as excessive. In addition to

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[22]As required by the Sixth Circuit, the district court on remand entered such an unconditional judgment. Amended Judgment, March 7, 1994 ("In accordance with the mandate of the United States Court of Appeals for the Sixth Circuit, it is hereby ordered and adjudged that : . . . 2. The $100,000.00 award of damages for her claim of age discrimination is REDUCED to $24,386.00")(capitalization in original.)

the Sixth Circuit decision in this case,[23] orders directing entry of modified jury verdicts have been issued by two other circuits. In *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987), the First Circuit refused to allow a new trial on the amount of punitive damages, reasoning that it was "best" for the appellate court, rather than a second jury, to "come to grips with the problem of the amount of damages to be awarded." 832 F. 2d at 207. The First Circuit directed entry of a damage award one tenth the amount awarded by the jury which had heard the case.[24] In *Guzman v. Western State Bank of Devils Lake*, 540 F.2d 948 (8th Cir. 1976), the Eighth Circuit, having declared excessive the jury's award of damages, directed entry of judgment of a specified smaller amount.[25]

On the other hand, five circuits have rejected as unconstitutional the practice followed by the Sixth Circuit in this case. The Second Circuit has repeatedly held that:

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[23]The Sixth Circuit issued a similar order directly reducing the amount of a jury verdict in *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1186 (6th Cir. 1983).

[24]"[R]emanding [this] case ... serves no useful purpose. The case would have to be retried totally just to determine punitive damages, all of which would place an intolerable burden on the parties and the court. Even still the jury would be faced with an elusive goal. Since we have determined that punitive damages are appropriate in this case, it is best that we come to grips with the problem of the amount of damages to be awarded, without remand, on the basis of the record available .... " 832 F.2d at 207 (Emphasis added).

[25]"[P]unitive damages ... should be reduced to $10,000. We ... direct the district court to enter judgment on the verdict rendered, except that the amount of punitive damages awarded ... is reduced to $10,000 ... [T]he case i[s] remanded to the district court with directions to enter judgment in accordance with this opinion." 540 F.2d at 954.

> the Seventh Amendment bars us from simply reducing a jury's award. The plaintiff must be given the option of a new trial on the issue of the damages found to be excessive.

Scala v. Moore McCormack Lines, 985 F.2d 680, 683 (2d Cir. 1993).[26] The Fourth Circuit has ruled that a federal court order which purported to simply reduce the amount of an excessive jury verdict would be unconstitutional because "the Seventh Amendment guarantees the right to a jury determination of the amount of . . . damages." *Defender Industries, Inc. v. Northwestern Mutual Life Inc. Co.*, 938 F.2d 502, 505-07 (4th Cir. 1991)[27]. The Seventh Circuit has also held that a federal court cannot simply enter a reduced judgment where it believes a jury verdict was excessive:

> The Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury. A federal judge can set aside a jury verdict as excessive, but ... [t]he proper corrective measure is to give [the plaintiff] the choice between accepting the remittitur and having a new trial on damages.

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[26]See also *Vassbinder v. Scott*, 976 F.2d 118, 122-23 (2d Cir. 1992) ("a court may not simply reduce an award of punitive damages, but must offer the plaintiff the option of a new trial on the issue. ... [T]he option of a new trial when a jury determination is set aside as excessive derives from ... the Seventh Amendment"); *Phelan v. Local 305, United Ass'n of Journeymen, etc.*, 973 F.2d 1050, 1064 (2d Cir. 1992) ("the court should not decrease damages based on its belief that they are excessive without affording the option of a new trial").

[27]The Fourth Circuit decision in *Defender Industries* overturned an earlier Fourth Circuit decision which had sanctioned direct reduction of disputed jury verdicts, See *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989).

McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984).

The Ninth Circuit follows the majority rule that "a remittitur without the option of a new trial is a violation of the Seventh Amendment." *Morgan v. Woessner*, 997 F.2d 1244, 1258 (9th Cir. 1993). The Tenth Circuit agrees that:

> The plaintiff must be offered a choice between a new trial and accepting a remittitur to avoid a serious problem under the Seventh Amendment, which reserves to the jury the determination of damages.

O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447 (10th Cir. 1987).

The circuits following the majority rule have recognized the existence of this inter-circuit conflict, and have criticized the circuits which do not follow that rule for ignoring the Seventh Amendment. Thus the Second Circuit observed that the rule requiring that a plaintiff be accorded the option of a new trial

> has not been uniformly followed in the circuit courts, nor has the impact of the Seventh Amendment on the question been uniformly recognized.

Vasbinder v. Scott, 976 F.2d 118, 123 (2d Cir. 1992). The Fourth Circuit, although following the majority rule, acknowledges that

> [s]everal other circuits have, upon finding a punitive damage awarded excessive, ordered it reduced to a sum certain...; however, these decisions do not address the constitutional right to a jury trial.

Defender Industries v. Northwestern Mut. Life Ins., 938 F.2d 502, 507 (4th Cir. 1991). *Morgan v. Woessner*, observed:

> Several circuits ... have reduced the amount of punitive damages awarded without giving the plaintiff a choice of a new trial on that issue.... However, none of these cases considered the Seventh Amendment, and we do not think it wise to follow this course of action.

997 F.2d at 1258.

This Court has expressly declared unconstitutional the type of order directed by the Sixth Circuit in this case. In *Kennon v. Gilmer*, 131 U.S. 22 (1889), a Montana territorial court, following a jury verdict in the amount of $20,750, had "ordered the judgment to be reduced to the sum of $10,750." 131 U.S. at 24. This Court held that such a judgment violated the Seventh Amendment:

> The [S]eventh ... Amendment ... is in full force in ... all ... Territories ... [I]n a case in which damages ... have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have received, to enter an absolute judgment for any sum other than that assessed by the jury.
>
> By the action of the court in entering an absolute judgment for the lesser sum, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he

> did not so remit there should be a new trial ... [t]he plaintiff was prejudiced, because he was deprived of the election to take a new trial....

131 U.S. at 29-30. The decision of the Sixth Circuit in the instant case clearly conflicts with this Court's decision. *Kennon*.

III. THE DECISION BELOW, OVERTURNING THE JURY'S FINDING OF LIABILITY ON PETITIONER'S TORT CLAIM, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH RULE 51, F.R.C.P.

The decision of the Sixth Circuit overturning the jury verdict on petitioner's pendant state tort claim raises a question of recurring importance regarding the standard which must be met to warrant granting judgment notwithstanding the verdict. The issue is whether, on appeal from a district court decision denying or granting judgment n.o.v., the sufficiency of the evidence should be measured against the standard set out in an unchallenged jury instruction or against the standard which the appellate court believes to be the correct statement of the law.

This case presents a classic example of this problem. The jury below was instructed that it should sustain petitioner's claim of intentional infliction of emotional distress if petitioner proved that respondent "by extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to her."[28] Respondent neither objected to this instruction nor asked for a more specific instruction on the issue. On appeal, respondent did not argue, and the Sixth Circuit did not hold, that a reasonable jury could not

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[28]Tr. v.v, p.563.

have found respondent's conduct "extreme" and "outrageous", as those pivotal terms are used in ordinary English and would have been understood by the jury.

Rather, the Sixth Circuit measured the sufficiency of the evidence, not against the standard in the jury instruction, but against the far more restrictive standard the appellate court believed was required by Kentucky case law:

> [T]he standard for proving liability for this tort is particularly stringent, requiring proof of conduct which goes beyond " 'all possible bounds of decency.'" *Humana of Kentucky, Inc. v. Seitz*, 796 S.W. 2d 1, 3 (Ky. 1990) .... [I]n far more extreme situations than that presented by Roush, the facts have been held to be legally insufficient to establish commission of the tort. See id. ... We conclude that under Kentucky law's stringent standards, no reasonable juror could conclude that Roush established the tort of outrage, and we therefore reverse the district court's denial of j.n.o.v. on this claim.

(Pet. App.15a) (Emphasis added). Respondent, however, had never asked that the jury be instructed that it must find "conduct which goes beyond all possible bounds of decency," and the Sixth Circuit did not suggest the jury could or somehow should have known of "Kentucky law's stringent standards."

The Seventh Circuit has expressly rejected the approach taken by the Sixth Circuit in this case, and has held that in circumstances such as these the sufficiency of the evidence must be measured against the standard in the unchallenged jury instruction. As Judge Easterbrook explained:

> When a party does not ask for [a different] instruction . . . we may reverse the district court's denial of judgment n.o.v. only if no reasonable jury could have found the evidence sufficient *under the instructions it heard.* If a party could argue that the evidence was insufficient under the correct legal standard, this would be an indirect method of attacking the instruction . . . .

Will v. Comprehensive Accounting Corp., 776 F. 2d 665, 675 (7th Cir. 1985)(Emphasis added); see also *Bogan v. Stroud*, 958 F. 2d 180, 184 (7th Cir. 1992).

The Eighth Circuit, on the other hand, applies precisely the opposite rule. Even where there has been no objection to the jury instructions,

> in determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions.

Coca Cola Bottling Co. of Black Hills v. Hubbard, 203 F. 2d 859, 862 (8th Cir. 1953); see also *Whitnack v. Douglas County*, 16 F. 3d 954, 957 n. 1 (8th Cir. 1994).

This Court has twice addressed this question in recent years without resolving it. In *Springfield v. Kibbe*, 480 U.S. 257 (1987), four members of the Court endorsed the Eighth Circuit rule. 490 U.S. at 264 (O'Connor,J. dissenting). The majority, however, declined to permit the petitioner to urge application of a legal standard inconsistent with the jury instruction to which it had not objected. 480 U.S. at 258-60. In *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), four Justices endorsed the position of the *Kibbe*

dissent. 485 U.S. at 119-20 (plurality opinion). Three justices, on the other hand, analysed the case "[i]n light of the jury instructions below", 485 U.S. at 137 (Brennan, J., concurring), Justice Stevens endorsed the Seventh Circuit position, 485 U.S. at 165-66, and Justice Kennedy did not participate. The time has come to resolve definitively this recurring and important legal issue.

CONCLUSION

For the above reasons, a Writ of Certiorari should be granted to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

No. 92-5802

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY ROUSH,
Plaintiff-Appellee,

v.

KFC NATIONAL MANAGEMENT COMPANY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed December 2, 1993

Before: GUY and BATCHELDER, Circuit Judges; and MILES, Senior District Judge*.

MILES, Senior District Judge. Defendant-appellant KFC National Management Company ("KFC") appeals a judgment in favor of the plaintiff-appellee Betty Roush in this action alleging violation of the Age Discrimination in Employment Act and intentional infliction of emotional distress. For the reasons which follow, we **AFFIRM IN PART, REVERSE IN PART,** and **REMAND** the case for entry of judgment consistent with this opinion.

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*The Honorable Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

I

Betty Roush began working in KFC's Louisville, Kentucky payroll processing department in 1980. Her duties generally consisted of entering payroll information from individual KFC stores into a computer system, editing proofs of the data, and making necessary corrections. Beginning early in her career at KFC, Roush was cited during performance reviews for certain deficiencies and problems in her performance. Twice--in 1983 and again in 1985--Roush was placed on probation. Roush appears to have had particular difficulty getting along with her last immediate supervisor, Judy Sanders. Roush felt that she was deliberately overworked in an attempt to test her because of her age. Sanders, in turn, appears to have had no particular fondness for Roush. In 1985, Sanders began documenting deficiencies in Roush's performance. On more than one occasion, Sanders made derogatory age-related comments about Roush, and mocked her. Other KFC employees joined in the mocking.

In 1985, Roush was warned by another payroll employee, Wetonah Crabb, that she was about to be fired. Crabb suggested that Roush take a sick leave for a period of time long enough for her pension to vest.[1] Roush accepted this advice. Thereafter, she returned to the payroll department for a few weeks to a newly-created position.[2] On September 20, 1985, Roush was informed

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[1]Crabb, who was subsequently terminated, filed her own ADEA action against KFC alleging that she was terminated in retaliation for assisting Roush. Crabb's action was consolidated with Roush's, although the jury denied her any recovery for her retaliation claim. The judgment in favor of KFC in Crabb's lawsuit was affirmed in a separate appeal filed in this court. *Crabb v. KFC Nat'l Management Co.*, No. 91-5474 (6th Cir. Jan. 6, 1992).

[2]The position was called "Miss Anita Check," a play on the words "I need a check." Roush's duties in this position required her to field calls from districts or stores which needed help meeting their payroll. At trial, Roush testified that she had little to do in this position; she felt that KFC created it as a ruse preliminary to firing her.

that she was being terminated because of poor work performance and failure to improve after repeated warnings. Roush was given the option of accepting early retirement in lieu of termination, and she elected to accept the early retirement. Roush was 61 years old at the time of her discharge.[3]

Roush filed this action against KFC in state court in September, 1986. Roush thereafter filed an amended complaint asserting a claim of discrimination on the basis of age under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 to 634. Roush's amended complaint also contained a pendent state law claim for intentional infliction of emotional distress. KFC filed a petition for removal on October 8, 1987. The case was tried to a jury, which returned a verdict in favor of Roush in the amount of $100,000 on her ADEA claim. In response to a special interrogatory, the jury also found that the discrimination against Roush was willful. The jury additionally found in favor of Roush on her state law claim of intentional infliction of emotional distress, awarding damages on this claim in the amount of $50,000. Judgment was entered in accordance with the jury's verdict in the total amount of $150,000.

KFC thereafter moved for judgment notwithstanding the verdict ("j.n.o.v.") or, alternatively, for a new trial. Roush, in turn, made her own post-trial motion, requesting that the ADEA award be doubled as liquidated damages, based on the jury's finding of willful discrimination. The district court granted KFC's motion for j.n.o.v. on the issue of willfulness, but denied it on all other grounds. The court, having granted j.n.o.v. on the willfulness issue, also denied Roush's motion to double the ADEA award. KFC appealed.[4]

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[3]Due to the circumstances of her retirement, we will refer to Roush's retirement as her "discharge."

[4]Roush has not appealed the district court's decision overruling the jury's finding of willfulness, and therefore that issue is not before us.

II

KFC argues that the district court erred in denying its motion for j.n.o.v. on Roush's ADEA claim, because the evidence was insufficient to show that Roush's age, and not other, legitimate considerations, was a reason for her discharge. In our de novo review of the district court's denial of j.n.o.v., we must determine

> . . . whether, viewing the evidence and reasonable inferences therefrom in the light most favorable to the non-moving party and without considering the credibility of the witnesses or the weight of the evidence, the only reasonable conclusion is a verdict against the nonmovant.

Moody v. Pepsi-Cola Metro. Bottling Co., Inc., 915 F.2d 201, 208 (6th Cir. 1990) (citing *Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 269 (6th Cir. 1987)).

The ultimate issue in an age discrimination action is whether age was "a determining factor" in the employer's decision to fire the plaintiff. *Fite v. First Tennessee Prod. Credit Assn.*, 861 F.2d 884, 890 (6th Cir. 1988); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). Roush must prove that "but for" KFC's discriminatory motive, she would not have been discharged. *Fite*, 861 F.2d at 889. This court has adopted a modified version of the guidelines established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) in age discrimination cases. Using these criteria, a plaintiff can establish a prima facie case by demonstrating that (1) she was a member of a protected class; (2) she was discharged; (3) she was qualified for the position; and (4) she was replaced by a younger person. *Blackwell*, 696 F.2d at 1180. Once the plaintiff establishes a prima facie case, the defendant must then come forward with evidence

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The district court made an award of attorneys' fees and costs to Roush, which is the subject of a companion case decided today, *Roush v. KFC Nat'l Management Co.*, No. 92-6685 (6th Cir. Dec. 2, 1993).

of a legitimate, non-discriminatory reason for the discharge. The plaintiff must then carry the ultimate burden of proving by a preponderance of the evidence that the reasons offered by the defendant were a pretext for discrimination. *See Fite*, 861 F.2d at 890. The plaintiff may carry this burden either directly by persuading the jury that a discriminatory motive more likely motivated the employer, or indirectly by showing that the proffered reason is unworthy of belief. *Moody*, 915 F.2d at 208.[5]

KFC does not dispute that the plaintiff established a prima facie case of discrimination. Moreover, although Roush suggests otherwise, KFC did offer evidence of a legitimate, non-discriminatory reason for Roush's discharge: poor performance. The real crux of this case is whether Roush carried her burden of proving that this reason was a pretext for age discrimination; in other words, whether she proved that she would not have been discharged but for her age. In support of its position that Roush was discharged for poor performance, KFC presented evidence that throughout her career with the company, Roush was informed in a number of performance reviews that her performance was inadequate in four areas: she did not follow company procedures; she did not properly prioritize her work; she spent too much time talking on the telephone; and her work area was disorganized. Roush also received four separate disciplinary notices, the first in December, 1982 for failing to follow departmental procedures. Four months later, in April, 1983, Roush was again put on probation when the following problem areas were identified in her work performance: communication and cooperation deficiencies; failure to perform work on a timely basis; too much talking on the telephone; failure to prioritize work; and failure to follow company standards and

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[5]The Supreme Court has recently stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Saint Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993).

procedures. These same problems in Roush's performance were again documented in 1985, at a time closer to her discharge.

However, notwithstanding this evidence showing that problems had been identified in her performance, Roush demonstrated that her performance problems would not have led to her dismissal but for her age. First, we note that the same employment evaluations which KFC contends document certain inadequacies in Roush's performance also reflect overall ratings of her performance as either "meet[ing] expectations" or "exceed[ing] expectations." In addition, Roush presented evidence showing that her last immediate supervisor, Judy Sanders, referred to her using age-related, derogatory terms such as "old bag" or "old gummer." Finally, Roush presented testimony that a former supervisor, Ron Fantino, refused to recommend her for an assignment training other employees which required travel to Baltimore because she was "too old." Under the circumstances, a reasonable jury could have found that but for her age, Roush's employment with KFC would not have been terminated. We therefore conclude that the district court's partial denial of j.n.o.v. on Roush's ADEA claim was proper.

III

KFC attacks the award of damages to Roush on her ADEA claim on two fronts. First, KFC argues that the award appears to have improperly included an amount representing front pay, although the court's instructions to the jury did not authorize such an award. Second, KFC argues that an award of front pay was improper in any event because the district court did not properly consider the preferred remedy of reinstatement in lieu of front pay, and because Roush simply did not establish her entitlement to such an award.

At the outset, we address an argument by Roush that the damages issues raised by KFC have not properly

preserved for appeal. Roush contends that KFC did not object to any part of the extensive testimony offered by her at trial on damages. She also contends, with regard to KFC's argument that the jury's award did not conform with the court's instructions on damages, that this specific issue was not properly preserved because it was not mentioned in KFC's motion for j.n.o.v. or for new trial.

While an issue which is not presented at all to the district court may not be raised for the first time on appeal, *Young v. Langley*, 793 F.2d 792, 794 (6th Cir.), *cert. denied*, 479 U.S. 950 (1986), KFC did allow the district court to pass on the issue of the excessiveness of the damages by filing a rather extensive post-trial motion attacking various aspects of the ADEA damage award. More specifically, KFC argued in its motion for j.n.o.v. that the jury's damage award improperly included front pay. KFC also argued that the availability of front pay is limited and that the district court should have articulated a rationale for refusing to compel reinstatement. We therefore conclude that the damages issues have been properly preserved for appeal.

This court reviews the district court's decision on a motion for new trial seeking a remittitur of a jury's verdict for an abuse of discretion. *Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 268 (6th Cir. 1989). Such a motion should be granted only "if the award *clearly* exceeds 'the amount which, under the evidence in the case, was the maximum that a jury could reasonably find to be compensatory' for the plaintiff's loss." *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988) (quoting *Manning v. Altec, Inc.*, 488 F.2d 127, 133 (6th Cir. 1973)).

The parties disagree on whether the jury's $100,000 damage award included front pay.[6] KFC contends that

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[6]The district court allowed the jury to return a general damage award on Roush's ADEA claim. Had the court intended to submit the issue of front pay to the jury, it would have been preferable to do so by special interrogatory, as this would facilitate our review. *See*

the award must have included front pay, because even Roush's own evidence justified a back pay award totalling only $24,386. Roush, in turn, argues that it is impossible to say whether the award included a front pay component. We agree with KFC, for no rational appraisal of the evidence supports a back pay award of $100,000.[7]

We have approved front pay as an available form of equitable relief in ADEA actions. *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984). KFC argues, however, that an award of front pay was improper because the district court did not properly consider whether to grant Roush the "preferred" remedy of reinstatement. This court has previously held that reinstatement is the presumptively favored equitable remedy. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988); *Henry v. Lennox Indus.*, 768 F.2d 746, 752-53 (6th Cir. 1985). However, while reinstatement should be granted in the ordinary case, *In re Lewis*, 845 F.2d at 630, it is an equitable remedy which is not appropriate in every case, such as where the plaintiff has found other work, where reinstatement would require displacement of a non-culpable employee, or where hostility would result. *Henry*, 768 F.2d at 753. While Roush has never requested reinstatement and does not, even at this juncture, appear to be interested in reacquiring her former

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Blackwell, 696 F.2d at 1185 n.13 (discussing preference for use of special interrogatory on ADEA willfulness issue).

[7]According to KFC's brief at p. 16, Roush's back pay damages of $24,386 consist of the following: (1) lost earnings from KFC of $77,848, minus interim earnings from her new employment of $41,481, and minus social security benefits of $25,954 and retirement benefits of $3,472 received as a result of her discharge; (2) lost contributions to KFC's savings plan amounting to six percent of lost earnings, or $4,671, plus a loss of return on this contribution in the amount of $1,509; (3) lost social security benefits of $5,053; and (4) lost retirement benefits of $6,212.

If the jury's award did not include front pay, then it was simply clearly excessive even using the figures supplied in Roush's own evidence. The jury's award of back pay was required to be reasonable and within the range of proofs in the case. *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 366 (6th Cir. 1978).

job, KFC has presented no evidence suggesting that it has ever offered reinstatement or that reinstatement is even a viable remedy given the apparent hostility generated in particular between Roush and Sanders.[8]

In our view, the more troubling aspect of this case is not the district court's failure to order reinstatement, which was neither offered nor requested, but rather its failure to determine, in advance of the submission of the issue of damages to the jury, whether an award of front pay was appropriate. Even if Roush did not seek reinstatement, she was not automatically entitled to an award of front pay. *See Davis*, 742 F.2d at 922-23 (stressing that front pay is "but one of a broad range of remedial measures available under the ADEA"); *but see Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1397 (6th Cir. 1990) ("front pay is a remedy presumed appropriate unless record evidence clearly demonstrates to the contrary"), *cert. denied*, 111 S. Ct. 2851 (1991).[9] We have previously held that determination of the amount of an award of front pay is a jury question. Specifically, in *Fite v. First Tennessee Production Credit Ass'n*, we stated that

> FTPCA's contention that front pay is not a question for the jury is at odds with the authority of this circuit. Indeed, *Davis* was an action where the jury determined the amount of front pay. In upholding the award of front pay, we noted that '[b]ased upon such determinations by the trial court, this court holds that the approval of the

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[8]We have never held that a plaintiff must request reinstatement as a prerequisite to recovering front pay, and we decline to so hold in this case. At least one other court has held that a plaintiff need not necessarily request reinstatement as a prerequisite to recovering front pay when reinstatement would be inappropriate. *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 730 (8th Cir.), *cert. denied*, 113 S. Ct. 635 (1992).

[9]In the sex discrimination context, we have stated that "an award of front pay is *sometimes* appropriate in order to effectuate fully the 'make whole' purposes of Title VII." *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985) (emphasis supplied).

> prospective damage award of $88,800 *as returned by the jury* was not an abuse of discretion.' *Davis*, 742 F.2d at 923 (emphasis added). Thus, we find that FTPCA's argument has no merit.

861 F.2d at 893.[10] However, we have also held that determination of the propriety of an award of front pay is a matter for the court. In *Davis*, we emphasized "that an award of front pay must be governed by the sound discretion of the trial court and may not be appropriate in all cases." 742 F.2d at 923.

We also agree with KFC that the district court's instructions to the jury did not authorize the jury to make an award of front pay. The district court's determination of whether an award of front pay is appropriate, and its articulation of the reasons why such an award is or is not appropriate, must ordinarily precede its submission of the case to the jury. This case highlights the most obvious reason why: because the jury must be instructed on what factors to consider in determining the amount of front pay, assuming that the court finds such an award is in order. We have previously stated that awards of front pay must be guided by consideration of certain factors, including

> an employee's duty to mitigate, 'the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards.'

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[10] The circuits are split on the issue of whether to characterize the calculation of front pay as a legal issue for the jury or an equitable issue for the court. *See generally Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1425-26 (10th Cir. 1991) (collecting cases); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1421-22 (4th Cir.) (same), *cert. denied*, 112 S. Ct. 429 (1991).

Shore v. Federal Express Corp., 777 F.2d 1155, 1160 (6th Cir. 1985) (quoting *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168-69 (S.D.N.Y. 1983)).

In this case, the district court did not articulate, in advance of submitting the case to the jury, whether it deemed an award of front pay to be appropriate, and its jury instructions neither authorized an award of front pay nor offered any guidance as to how the jury should determine the amount of such an award.[11] Instead, the

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[11]The only instruction which the court gave to the jury on the issue of ADEA damages for Roush stated as follows:

> Now, if you find for Mrs. Roush, you will award her damages for lost income and benefits which she incurred as a result of her discharge, deducting therefrom any sums which you may find she has received since the date of her discharge.

Transcript at 563. Although this instruction is cursory, KFC is correct that as given, the instruction does not appear to authorize an award of front pay. While Roush has argued that this instruction may be construed as a front pay instruction, we note that the district court apparently declined to give an instruction tendered by Roush which clearly authorized an award of front pay. This tendered instruction read as follows:

> If you have determined that the Plaintiff Betty Roush was discriminated against because of her age by the Defendant, then you must determine the amount of damages sustained by her.
>
> Normally speaking, a person who is a victim of illegal age discrimination is entitled to be restored or reinstated to the position she would have been in but for the discrimination with all lost monies and benefits. For such an individual the appropriate measure of damages is the amount of lost salary from the date of the her [sic] termination through the date of trial and future lost salary to the date that you believe she will stop working in the future. . . . This instruction allows you to award both back pay, that is pay from the date of her termination to the present and front pay, that is the payments she would have from the date of the trial until her retirement age.

In view of those factors which *Shore* requires to be considered in determining an award of front pay, 777 F.2d at 1160, we cannot share Roush's strained interpretation of the district court's given instruction as authorizing an award of front pay.

first express indication of the district court's view of the propriety of front pay appears in its order on the post-trial motions, in which the court stated:

> . . . While criticizing Roush for failing to seek reinstatement, KFC has not suggested in any way that reinstatement would be a realistic possibility. We find, therefore, that an award of front pay can properly be made in this case from the evidence presented by Roush. . . . Further, we find nothing in the provisions of ADEA which precludes projection of damages to age 75. There was some evidence offered by Roush regarding her need to continue working in order to provide for her handicapped child. This evidence supports her contention that she would remain in the workforce for an extended period of time. . . .
>
> KFC would have the court speculate at this late date as to the various components of damage of which the award is comprised. KFC did not request that interrogatories or a detailed verdict form be given to the jury in order to have the award parsed out. It is sufficient for our purposes that we find substantial evidence offered by Roush and that there is some basis in the record for the damage award. Front pay, back pay, and various benefits identified could all properly be considered by the jury in reaching its verdicts. . . .

While we review the district court's decision determining the propriety of an award of front pay for an abuse of discretion, *see Shore*, 777 F.2d at 1159 (front pay award "must be governed by the sound discretion of the trial court"), we cannot condone the *ex post facto* determination made by the district court in this case. The district court, having previously refused to give a front pay instruction to the jury, nonetheless approved an apparent award of front pay by the jury, based only on testimony by the plaintiff that she intended to remain in the workforce beyond the usual retirement age. This

backward approach resulted in the jury being given virtually no guidance in determining the amount of the front pay award.

While ordinarily we would remand the issue of front pay to the district court for a more detailed articulation of the reasons for its action (and, alternatively, for a new trial on the issue of front pay), we conclude that a remand in this case would serve no purpose, because the record simply does not support an award of front pay in any amount. Roush has failed to articulate how the evidence in this case supports an award of front pay, and we fail to see the justification for such an award. Within approximately two months of her discharge from KFC, Roush accepted a full-time position with the Bauer-Sharp Company, at a salary comparable to that which she had earned at KFC (albeit without benefits). Although by the time of trial her hours at Bauer-Sharp had been reduced to part-time for apparent business reasons, Roush voluntarily chose not to seek alternative or supplemental employment in order to make up for this reduction in her income, preferring instead to receive social security benefits.[12] Based upon these facts, we conclude that as a matter of law, front pay was not appropriate in this case. In its order on post-trial motions, the district court found that an award of front pay was appropriate because Roush had contended that she would remain in the work force on an extended basis due to her need to provide for a handicapped child. However, her intentional limitation of her income in order to continue receiving social security benefits terminates any entitlement to front pay which she may otherwise have had. *See Dominic v. Consolidated*

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[12]When asked why she had gone from earning $10,040 from Bauer-Sharp in 1986 to only $7,000 in 1987, Roush testified:

> . . . They asked me if I would go part-time and I went that way. Then I was able to start collecting my Social Security. . . .
>
> I couldn't earn more. If I did, they would take it away from me, my Social Security.

Joint Appendix at 462-63.

Edison Co. of New York, Inc., 822 F.2d 1249, 1258 (2d Cir. 1987) (plaintiff's failure to mitigate may foreclose availability of front pay).

Based on the proofs presented at trial by Roush, her damage award for back pay should be reduced to $24,386, which is the maximum amount a jury could reasonably find to be compensatory for her loss. This amount includes lost earnings between the date of her discharge and the time of trial (less interim earnings obtained from other employment and pension and social security benefits which Roush received as a result of her discharge); lost contributions to KFC's savings plan; lost social security benefits; and lost retirement benefits.[13] We remand for entry of judgment in this amount.

IV

KFC argues that the district court erred in failing to grant j.n.o.v. on Roush's state law claim of intentional infliction of emotional distress, otherwise known as the tort of "outrage," because the evidence was insufficient as a matter of law to meet Kentucky's strict standard for establishing this tort. We agree.

Kentucky has recognized that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability." *Craft v. Rice*, 671 S.W.2d 247, 251 (Ky. 1984).

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[13]Roush argues that there was testimony presented that she was the lowest paid person in the department and that her pay raises were "considerably less" than those of others in the department. Based upon this testimony, she contends, "[t]he jury may well have decided that as part of her back pay that situation should be remedied. If they did, it could easily have brought a back pay award, considering all elements, to in excess of $100,000." Appellee's Brief at p. 15. However, Roush fails to cite to evidence in the record substantiating any amounts by which she was allegedly underpaid, and we conclude that the jury would necessarily have had to speculate in order to award back pay totalling $100,000 on this basis. *See Rodgers v. Fisher Body Division, General Motors Corp.*, 739 F.2d 1102, 1107 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) ("Although juries are ... accorded great discretion in determining the amount of damage awards, damages must be proved; they must not be speculative.").

However, the standard for proving liability for this tort is particularly stringent, requiring proof of conduct which goes beyond "'all possible bounds of decency.'" *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990) (citation omitted). Roush's outrage claim is essentially based on testimony showing that she was subjected to derogatory remarks about her age (many of which were made behind her back); that she had to perform certain disfavored tasks more than other employees[14]; that she had to eat lunch by herself because her supervisor told other employees not to eat with her; that she was not allowed to keep extra work supplies at her desk, thus forcing her to walk to the supply room despite the fact that she suffered from arthritis; and that some of her personal belongings were removed from her desk and placed in storage during a sick leave. Even when considered in their totality, these actions do not amount to "extreme and outrageous conduct" justifying imposition of liability for the tort of outrage in this case. Indeed, in far more extreme situations than that presented by Roush, the facts have been held to be legally insufficient to establish commission of the tort. *See id.* (plaintiff, who delivered stillborn baby alone in hospital bed, was told by nurse to "shut up" in response to pleas for help, and was told that baby would be "disposed of" in the hospital when she asked where dead baby was being taken). We conclude that under Kentucky law's stringent standards, no

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[14]One such task involved the tearing of computer printouts. Roush testified that performing this task was difficult for her because it required her to stand, even though she suffered from arthritis. However, the testimony showed that Roush was relieved of performing the task in a standing position upon presentation of a note from her doctor.

reasonable juror could conclude that Roush established the tort of outrage, and we therefore reverse the district court's denial of j.n.o.v. on this claim.

V

For the foregoing reasons, we **AFFIRM** the judgment **IN PART, REVERSE IN PART,** and **REMAND** for entry of judgment consistent with this opinion.

No. 92-5802/6685

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY ROUSH,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
KFC NATIONAL MANAGEMENT COMPANY,	)	
Defendant-Appellant.	)	

BEFORE: GUY and BATCHELDER, Circuit Judges; and MILES,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members by also to all other active judges of

*Hon. Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

LEONARD GREEN, CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BETTY ROUSH PLAINTIFF

v. CIVIL ACTION NO. 86-0837-L(CS)

KFC NATIONAL MANAGEMENT COMPANY DEFENDANT

MEMORANDUM OPINION

This matter is before the court for consideration and disposition of the following motions:

1. Motion of the plaintiff, Betty Roush ("Roush) to amend the judgment;

2. Motion of the defendant, KFC National Management Company ("KFC"), for judgment notwithstanding the verdict (JNOV); and

3. Motion for plaintiff, Betty Roush, to strike KFC's motion and memorandum for judgment notwithstanding the verdict.

This age discrimination case was tried to a jury, the late Judge Thomas A. Ballantine Jr. presiding, on March 4-6

and 12-14, 1991. Judgment was entered March 14, 1991 in accordance with the jury verdicts:**

> That the plaintiff, Betty Roush, on her claim against KFC for intentional infliction of emotional distress is awarded $50,0000.00.
>
> That the plaintiff, Betty Roush, on her claim for age discrimination against KFC is awarded $100,000.00.
>
> That KFC's violation was willful or in reckless disregard of the provisions of the [Age Discrimination in Employment] Act.

Roush has filed a motion to amend the judgment seeking an order doubling the $100,000.00 damage award pursuant to 29 U.S.C. §626(b) which provides for liquidated or "double" damages upon a finding of willful or reckless disregard of the Age Discrimination in Employment Act ("ADEA").

KFC has moved for judgment notwithstanding the verdict, or alternatively, a new trial asserting that (1) the jury's findings of age discrimination, willfulness, intentional

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** The case was assigned to this judge for disposition of the pending post-trial motions.

infliction of emotional distress, and general damages are not supported by sufficient evidence, and (2) the jury was instructed erroneously with respect to the question of willfulness.

Roush has moved to strike the JNOV motion on the grounds that (1) it was not timely served, (2) it is based upon grounds not raised on directed verdict, and (3) the form of the motion fails to comply with Local Rule 6.

The motion of Roush to strike will be denied. The JNOV motion was timely filed and served insofar as the judgment entered by the court on March 14, 1991 was not the final judgment in the case. As evidenced by Roush's motion to amend, an award of "double" damages is yet to be made by the court. Roush contends that the entry of the liquidated damage award is a mere ministerial act in light of the provision in the ADEA for the making of such an award. Although entitlement to liquidated damages is triggered by a verdict which finds "willful conduct," the award of "double" damages is made by the court as a matter of law by further

judgment. Thus, the JNOV time clock did not begin running on March 14, 1991, and the filing and service of the JNOV motion were timely made.

The JNOV motion will be considered insofar as it challenges the sufficiency of the evidence to support the jury's verdicts. The grounds stated by KFC for directed verdict at the close of Roush's case and at the conclusion of all the evidence were not made entirely clear. However, KFC appeared to challenge the sufficiency of the evidence overall. The challenge to the jury instruction on willfulness will be considered, in our discretion, only for purposes of determining whether obvious and prejudicial error was committed, inasmuch as KFC failed to raise the objection to the willfulness instruction, as required by Fed. R. Civ. P. 51. *See Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987); *Thompson v. Paasche*, 950 F.2d 306, 314 (6th Cir. 1991).

"A judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Gillham v. Admiral Corp.*, 532

F.2d 102, 109 (1975), *cert. denied*, 424 U.S. 913, 96 S. Ct. 1113, 47 L. Ed. 2d 318 (1976) (*Gillham* is cited more recently in *Morelock v. NCR Corp.*, 586 F.2d 1096 (1978), *cert. denied*, 441 U.S. 906, 99 S. Ct. 1995, 60 L. Ed. 2d 375 (1979)).

> In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. [citation omitted]. If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a difference conclusion, then the motion should be granted. [citations omitted].

Morelock, 586 F.2d at 1104-05.

Upon review of the evidence in the light most favorable to Roush, we find substantial evidence in the record by which she established a prima facie case of discrimination and from which a jury could reasonably find that the reasons for discharge maintained by KFC were pretextual. *See, i.e., Blackwell v. Sun Electric Corp.*, 696 F.2d

1176 (6th Cir. 1983).

The $100,000.00 general damage award similarly was based upon substantial evidence which was unrebutted by KFC. KFC contends that Roush improperly offered evidence in support of an award of front pay without first seeking reinstatement and that her proof on the issue of front pay impermissibly projected her damages forward to age 75.

Awards of front pay have been found to be appropriate in cases where reinstatement is not feasible. Fed. R. Civ. P. 54(c) states:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

As noted in *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 870 (5th Cir. 1991), "the ADEA creates jurisdiction for the court 'to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter ...' 29 U.S.C. §626(b)." While criticizing Roush for failing to seek

reinstatement, KFC has not suggested in any way that reinstatement would be a realistic possibility. We find, therefore, that an award of front pay can properly be made in this case from the evidence presented by Roush. "Calculations of front pay cannot be totally accurate because they are prospective and necessarily speculative in nature. [citations omitted]." *Reneau*, 945 F.2d at 870. Further, we find nothing in the provisions of ADEA which precludes projection of damages to age 75. There was some evidence offered by Roush regarding her need to continue working in order to provide for her handicapped child. This evidence supports her contention that she would remain in the workforce for an extended period of time. KFC has stated that the designation in the 1986 version of the Act of the protected class as "individuals who are at least 40 years of age but less than 70 years of age" is supportive of its contention that Roush may not recover damages for years of employment beyond her 70th birthday. KFC has failed to explain how the statute, which merely identifies the class of

persons protected under the Act, has a proscriptive effect on the damage award in this case.

An award of damages under the Act is intended to make the victim of discrimination whole. Items such as raises, pension plan contributions, social security early withdrawal penalties, and company benefits are includable in the calculation.

KFC would have the court speculate at this late date as to the various components of damage of which the award is comprised. KFC did not request that interrogatories or a detailed verdict form be given to the jury in order to have the award parsed out. It is sufficient for our purposes that we find substantial evidence offered by Roush and that there is some basis in the record for the damage award. Front pay, back pay, and various benefits identified could all properly be considered by the jury in reaching its verdicts. KFC has shown no justification for excluding all or any portion of the award.

KFC contends that the jury was instructed

erroneously on the issue of willfulness. As noted earlier, our analysis of this issue is limited to a review for obvious and prejudicial error. In this case we find obvious and prejudicial error with respect to the jury's willfulness determination. The United States Court of Appeals for the Sixth Circuit in *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), adopted the "predominant factor" standard set out in *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988). The Sixth Circuit held that the District Court's instruction, almost identical to the instruction given in this case, was erroneous. Upon review of the record, we are constrained to find that "there is such significant evidence of other possible motives that we cannot confidently say the jury would have found age was the 'predominant' determinative factor in [Roush's] discharge." The willfulness verdict must therefore be vacated and the motion for an award of double damages will be denied.

Finally, KFC claims that there was insufficient evidence to support a finding of intentional infliction of

emotional distress. We find that there was sufficient evidence in the record upon which a jury could reasonably base a verdict that the conduct of KFC was so extreme in degree as to go beyond all possible bounds of decency, as to be regarded as atrocious and utterly intolerable in a civilized community. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990), citing *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984).

An order will be entered herein this date in accordance with this opinion.

This ____ day of _____, 1992.

_____
CHARLES R. SIMPSON III
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record